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No. 99-1677

Supreme Court, U.S.
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In The

Supreme Court of the United States

MYSTIC TRANSPORTATION, INC., MYSTIC BULK CARRIERS, INC. AND LEONARD BALDARI,

Petitioners,

v.

CHARLES R. CARLTON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Second Circuit properly applied Fed. R. Civ. P. 56(c) when it reversed the District Court's grant of summary judgment and reinstated Respondent's age discrimination claim.

2. Whether the Second Circuit properly determined that there were triable issues of material fact that age discrimination was a motivating factor in Petitioners' decision to terminate Respondent's employment.

LIST OF PARTIES

In accordance with Rule 15.3, Rule 24.1(b) and Rule 29.1 of the Rules of the Supreme Court of the United States, the following is a list of all parties to the proceeding in the United States Court of Appeals for the Second Circuit:

1. Charles R. Carlton, Plaintiff/Respondent;
2. Mystic Transportation, Inc., Defendant/Petitioner;
3. Mystic Bulk Carriers, Inc., Defendant/Petitioner;
4. Leonard Baldari, Defendant/Petitioner;
5. Ethan A. Brecher, Attorney for Plaintiff/Respondent;
6. Ronald B. Goodman, Attorney for Defendants/Petitioners.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

STATUTORY PROVISIONS INVOLVED 1

COUNTERSTATEMENT OF THE CASE 1

I. STATEMENT OF FACTS 1

II. PROCEDURAL HISTORY 5

A. The District Court's Decision 5

B. The Second Circuit's Decision 6

REASONS FOR DENYING THE WRIT 6

ARGUMENT 8

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE SECOND CIRCUIT PROPERLY APPLIED THE SUMMARY JUDGMENT STANDARD UNDER FED. R. CIV. P. 56(c) TO THIS AGE DISCRIMINATION CASE 8

A. The Second Circuit Correctly Applied The Summary Judgment Standard Mandated By Fed. R. Civ. P. 56(c) And This Court's Precedent 8

B. The Second Circuit Correctly Considered The Summary Judgment Standard As It Is Applied In Discrimination Cases 9

TABLE OF CONTENTS – Continued

Page

II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE SECOND CIRCUIT PROPERLY DETERMINED THAT THERE WERE TRIABLE ISSUES OF MATERIAL FACT THAT AGE DISCRIMINATION WAS A MOTIVATING FACTOR IN PETITIONERS' DECISION TO TERMINATE RESPONDENT'S EMPLOYMENT..... 10

A. The Second Circuit Adhered To The Proper Evidentiary Framework For Evaluating Whether Carlton's Age Discrimination Claim Should Be Submitted To A Jury..... 10

1. The *Prima Facie* Case of Discrimination... 11

2. The Alleged Non-Discriminatory Reasons for the Termination..... 11

3. Mystic's Alleged Non-Discriminatory Reasons are Pretextual..... 12

B. The Second Circuit Properly Determined That There Were Triable Issues Of Material Fact As To Whether Carlton's Termination Was Motivated By More Than Mystic's Finances..... 14

C. The Second Circuit Properly Determined That There Were Triable Issues Of Material Fact As To Whether Carlton's Termination Was Motivated By More Than Carlton's Job Performance..... 17

D. Mystic Never Tried to Justify Its Pretextual Explanation For Carlton's Termination..... 19

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 8, 9, 10

Burger v. New York Institute of Technology, 94 F.3d 830 (2d Cir. 1996) 15

Carlton v. Mystic Transp., Inc., 202 F.3d 129 (2d Cir. 2000) ..... *passim*

Castleman v. Acme Boot Co., 959 F.2d 1417 (7th Cir. 1992) 17

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 8

Cronin v. Aetna Life Insurance Company, 46 F.3d 196 (2d Cir. 1995) 13, 16

DeMarco v. Holy Cross High School, 4 F.3d 166 (2d Cir. 1993) 17

E.E.O.C. v. Ethan Allen, Inc., 44 F.3d 116 (2d Cir. 1996) 17

Fisher v. Vassar College, 114 F.3d 1332 (2d Cir. 1997) (en banc), *cert. denied*, 522 U.S. 1075 (1998) 11, 20

Gallo v. Prudential Residential Servs., Ltd. Partnership, 22 F.3d 1219 (2d Cir. 1994) 9

Greenway v. Buffalo Hilton Hotel, 143 F.3d 47 (2d Cir. 1998) 19

Hunt v. Cromartie, 526 U.S. 541 (1999) 8, 9, 10

McDonnell Douglas Corp. v Green, 411 U.S. 792 (1973) 10, 11

Meiri v. Dacon, 759 F.2d 989 (2d Cir.), *cert. denied*, 474 U.S. 829 (1985) 9

TABLE OF AUTHORITIES – Continued

Page

Montana v. First Fed. Sav. & Loan Ass'n, 869 F.2d 100 (2d Cir. 1989) 9, 15

O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996) 10, 14

Oxman v. WLS-TV, 846 F.2d 448 (7th Cir. 1988) ... 15, 16

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 14

Rose v. Wells Fargo & Co., 902 F.2d 1417 (9th Cir. 1990) 16

Schmitz v. St. Regis Paper Company, 811 F.2d 131 (2d Cir. 1987) (per curiam) 17

St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993) ..... *passim*

Stratton v. Department for the Aging, 132 F.3d 869 (2d Cir. 1997) 15, 20

Taylor v. Canteen Corp., 69 F.3d 773 (7th Cir. 1995) 16

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) ..... *passim*

United States Postal Serv. Bd. Of Governors v. Aikens, 460 U.S. 711 (1983) 9, 13, 14

United States v. Milton, 8 F.3d 39 (D.C. Cir. 1993), *cert. denied*, 513 U.S. 919 (1994) 18

Viola v. Philips Medical Systems of North America, 42 F.3d 712 (2d Cir. 1994) 15, 16

Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394 (7th Cir. 1997) 20

TABLE OF AUTHORITIES – Continued

Page

Washington v. Garret, 10 F.3d 1421 (9th Cir. 1993) 17

Woods v. Friction Materials, Inc., 30 F.3d 255 (1st Cir. 1994) 20

STATUTES

18 U.S.C. § 1001 18

29 U.S.C. §§ 621 *et seq.* 5

29 U.S.C. § 623(a) 1

RULES

Fed. R. Civ. P. 56(c) 1, 7, 8

OTHER AUTHORITIES

N.Y. Exec. Law § 296(1)(a) (McKinney Supp. 1999) 5

Administrative Code of the City of New York § 8-101 5

2 John H. Wigmore, Evidence In Trials At Common Law (Chadbourn rev. 1979) 18

STATUTORY PROVISIONS INVOLVED

The Age Discrimination in Employment Act, 29 U.S.C. § 623(a) provides, in pertinent part:

> "It shall be unlawful for an employer . . . to discharge any individual or otherwise discriminate against any individual because of such individual's age . . . "

Fed. R. Civ. P. 56 provides in pertinent part:

> "(c) Motion and Proceedings Thereon . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

COUNTERSTATEMENT OF THE CASE

I. STATEMENT OF FACTS

Petitioner Leonard Baldari is the president and sole shareholder of both Petitioner Mystic Transportation, Inc., a trucking company that transports heating oil within the New York City metropolitan area, and Petitioner Mystic Bulk Carriers, a trucking company that transports gasoline, liquid asphalt, jet fuel and cement in

the same market. (A. 728-730)[1] (collectively "Mystic" or "Petitioners")

Respondent Charles R. Carlton ("Carlton" or "Respondent") was born on August 15, 1938. (A. 680) In August of 1988, Baldari hired Carlton, then age 49, as a salesman. (A. 681-82) Shortly after hiring him, Baldari appointed Carlton "Director of Marketing." (A. 683, 729) Mystic paid Carlton an annual base salary of $57,200, plus additional cash payments of $100 per week. (A. 721-22, 777) Carlton's principal job duty was to help increase Mystic's delivery income, its primary source of revenue. (A. 742) Towards that end, Carlton's responsibilities included assisting Mystic in maintaining and servicing existing accounts and soliciting new accounts. (A. 729, 742) Mystic's annual delivery income increased substantially during Carlton's tenure as Director of Marketing, nearly doubling over the five years he was at the company from $12,485,480 in 1989 to $23,622,567 in 1994. (A. 138-212, 215-351, 389-436, 552-55, 764, 782-83) Carlton also solicited, on his own, nearly sixty new accounts to Mystic during his employment. (A. 687-713)

During the course of his employment, Carlton never received a negative written performance evaluation or warning that his performance needed improvement, and Mystic never prepared any written critique of his performance. (A. 731, 738)

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[1] References to "A. ___" are to the Parties Joint Appendix filed with the United States Court of Appeals for the Second Circuit in the proceeding below.

On April 28, 1995, Mystic fired Carlton, then 56 years old. (A. 732, 748) At the termination meeting, Baldari told Carlton that he wanted him to "retire" and claimed the termination was for financial reasons. (A. 715, 727) Baldari did not cite Carlton's job performance as a reason for the termination. (A. 734-35) Following Carlton's termination, his job responsibilities were re-assigned to substantially younger individuals: Lydia Gounalis, age 38 (18 years younger than Carlton) and John Oravets, age 31 (25 years younger than Carlton). (A. 685-86, 739-40, 745, 751-52, 757)

Mystic had hired Gounalis in May 1994 to assist Carlton with marketing. (A. 735) Gounalis assumed immediate responsibility for Carlton's job duties upon his termination and was appointed Director of Marketing at a salary of at least $42,000 per year. (A. 438, 735, 745, 754) In its response to the Equal Employment Opportunity Commission's ("EEOC") investigation of Carlton's charge of age discrimination, Mystic admitted that Gounalis replaced Carlton. (A. 446-47)

In August 1995, just three months after Carlton's termination, Mystic hired Oravets, a former employee fired in 1993 for "insubordination," to share with Gounalis Carlton's former responsibilities. (A. 738) At the time, Mystic's allegedly poor financial situation had not improved significantly, and the firm was not busy. (A. 754-55, 778) Oravets had no previous marketing experience with a trucking company. (A. 442, 739, 746, 758) Before his 1993 termination, Oravets' salary was decreased because of his poor performance. (A. 741) Upon his rehire, Mystic paid Oravets an annual salary of at least $46,000 per year. (A. 440) In the Spring of 1996,

Oravets formally assumed from Gounalis the title of Director of Marketing. (A. 745, 754)

On September 25, 1995, Carlton filed a charge of age discrimination with the EEOC. (A. 35-37) In response to Carlton's charge, Mystic claimed that he was terminated as part of a reduction-in-force/cost-saving measure, due to the relatively warm 1994/1995 winter. (A. 446-47) Mystic asserted that the warm 1994/1995 winter resulted in a reduction in its heating oil transportation revenue and it subsequently was required to make cuts to save money, including firing employees. (A. 446-47) In support of this contention, Mystic disingenuously represented to the EEOC that "[Mystic] recorded a first quarter deficit of $1.5 million dollars." (A. 446-47, 743-44, 796-97) In fact, Mystic had actually realized an operating profit of $584,108 during that quarter. (A. 145-59, 780-81) The EEOC relied upon Mystic's misrepresentation concerning the company's financial condition in deciding to terminate its investigation of Carlton's charge: "[t]he Commission has also found that [Mystic] was facing a large monetary deficit at the time which was the contributing factor for your layoff. Thus the Commission is unable to conclude that there were discriminatory motives involved in your discharge." (A. 449)

Additionally, in its response to the EEOC, Mystic cited its allegedly poor financial situation as the only reason for Carlton's termination, making no mention of Carlton's allegedly poor job performance, which it asserted for the first time in this litigation as a reason for his termination. (A. 446-47, 458, 734, 743, 732-33)

Unlike Carlton, who was employed in a position of responsibility at Mystic, the other employees Mystic terminated in 1995 did not hold commensurate positions of responsibility. (A. 748-49, 767, 771) Most of the other terminated employees were paid on an hourly rate and did not report directly to Baldari. (A. 750, 776-777) The decision to terminate the other individuals was based on the suggestions of others, whereas Baldari made the decision to fire Carlton. (A. 750-51)

Mystic also provided one of the employees terminated in the reduction-in-force, Thomas DeRita (who was younger than Carlton), with a letter stating that Mystic would recall him if business improved. (A. 768) Another terminated employee, Gary Flynn, was subsequently rehired. (A. 644) Carlton never received a recall option or an offer of reinstatement.

II. PROCEDURAL HISTORY

A. The District Court's Decision

On August 19, 1996, Carlton commenced the instant action in the United States District Court for the Eastern District of New York, alleging a violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.* (1994) ("ADEA"); the New York State Human Rights Law, N.Y. Exec. Law § 296(1)(a) (McKinney Supp. 1999); and the Administrative Code of the City of New York § 8-101. On July 1, 1998, United States District Judge David G. Trager granted Mystic's motion for summary judgment in an oral opinion made on the record and subsequently issued a written opinion. The District Court found that Carlton had failed to establish a

prima facie case of age discrimination and that even assuming, arguendo, that Carlton had made out a *prima facie* case, he did not adequately demonstrate that Mystic's purported reasons for terminating him were a pretext for age discrimination. Carlton filed a timely appeal from Judge Trager's judgment dismissing his claim.

B. The Second Circuit's Decision

On January 28, 2000, the United States Court of Appeals for the Second Circuit reversed the District Court's grant of summary judgment. Contrary to the findings of the District Court, the Second Circuit found that (1) Carlton had established a *prima facie* case of age discrimination and that (2) since genuine issues of material fact existed regarding the veracity of Mystic's non-discriminatory reasons for firing Carlton, a rational jury could conclude that age was a motivating factor in Mystic's decision to terminate Carlton's employment. Accordingly, the Second Circuit remanded the case to the District Court with instructions to reinstate Carlton's complaint and to conduct further proceedings on the merits of his ADEA claim consistent with its decision. Mystic then filed the instant Petition.

REASONS FOR DENYING THE WRIT

Mystic's Petition should be denied because the Second Circuit correctly found that there are genuine issues of material fact as to whether Carlton's age was a factor in Mystic's decision to fire him.

The Second Circuit conducted a detailed, factual analysis to determine whether there was a genuine dispute regarding whether age bias motivated Mystic to fire Carlton. As the Court held: "Carlton *must demonstrate,* at least in his individual case, that the reduction-in-force and the allegation of poor performance are actually a pretext and that *the real reason for his discharge was his age.*" *Carlton v. Mystic Transp., Inc.*, 202 F.3d 129, 136 (2d Cir. 2000) (emphasis added). By the very language of its own analysis, which adheres to this Court's holding in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 505 (1993), the Second Circuit concluded that Carlton had demonstrated sufficient evidence of discriminatory animus that raised a genuine issue of material fact as to whether age was a motivating factor in Mystic's decision to terminate him.

Accordingly, Mystic's contention that this Court should resolve what Mystic perceives to be a Circuit conflict regarding whether "minimal and indirect evidence" is enough to create a genuine factual issue in an employment discrimination case is irrelevant to the issues in this matter.

Mystic also contends that this case presents issues relating to the standard of review that should be applied when considering motions for summary judgment in age discrimination cases. Because the Second Circuit explicitly followed the requirements of Fed. R. Civ. P. 56(c) and the teachings of this Court on the proper application of Rule 56, Mystic's arguments on the "weighing of evidence" and the "shifting of burdens" are inapplicable and irrelevant to the issues in this case.

Because Mystic has failed, in all regards, to identify or delineate a reason why this Court need consider this matter on its merits, its Petition for a Writ of Certiorari should be denied.

ARGUMENT

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE SECOND CIRCUIT PROPERLY APPLIED THE SUMMARY JUDGMENT STANDARD UNDER FED. R. CIV. P. 56(c) TO THIS AGE DISCRIMINATION CASE.

A. The Second Circuit Correctly Applied The Summary Judgment Standard Mandated By Fed. R. Civ. P. 56(c) And This Court's Precedent

In reversing the District Court's grant of summary judgment, the Second Circuit correctly applied the standard mandated by Fed. R. Civ. P. 56(c) and this Court's precedent: Summary judgment is appropriate only where there is no genuine issue as to material fact, so that the moving party is entitled to a judgment as a matter of law. *Carlton*, 202 F.3d at 133; *see* Fed. R. Civ. P. 56(c); *Hunt v. Cromartie*, 526 U.S. 541, 549 (1999); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

The Second Circuit appropriately placed the burden on Mystic, as the moving party, to establish that there were no genuine factual disputes, *see Celotex Corp. v Catrett*, 477 U.S. at 323, and assessed the record for such disputes while believing Carlton's evidence and drawing all justifiable inferences in his favor. *Carlton*, 202 F.3d at

133-34; *see Hunt*, 526 U.S. at 552; *Anderson*, 477 U.S. at 255. The Second Circuit properly recognized that it could only grant Mystic's motion if it determined that, under governing law, the evidence was so one-sided that reasonable minds could not differ and Mystic must prevail as a matter of law. *Carlton*, 202 F.3d at 134; *see Anderson*, 477 U.S. at 251-52.

B. The Second Circuit Correctly Considered The Summary Judgment Standard As It Is Applied In Discrimination Cases

Adhering to long-standing precedent, the Second Circuit noted that a court should be extremely cautious in granting summary judgment in a discrimination case where intent and state of mind are in dispute. *Carlton*, 202 F.3d at 134; *see United States Postal Serv. Bd. Of Governors v. Aikens*, 460 U.S. 711, 716 (1983); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 255, n.8 (1981); *Gallo v. Prudential Residential Servs., Ltd. Partnership*, 22 F.3d 1219, 1224 (2d Cir. 1994); *Montana v. First Fed. Sav. & Loan Ass'n*, 869 F.2d 100, 103 (2d Cir. 1989); *Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir.), *cert. denied*, 474 U.S. 829 (1985). Intentional discrimination is an "elusive factual question," *Burdine*, 450 U.S. 248, 255, n.8, that is "sensitive and difficult" because "[t]here will seldom be 'eyewitness' testimony as to the employer's mental process." *Aikens*, 460 U.S. at 716. "Because writings directly supporting a claim of intentional discrimination are rarely, if ever, found among an employer's corporate papers, affidavits and depositions must be carefully scrutinized for circumstantial proof which, if believed, would show discrimination." *Gallo*, 22 F.3d at 1224. The Second Circuit correctly

determined that, once it had established that there were disputed facts of motivation and intent at issue, it was not to resolve them at the summary judgment stage, *Carlton*, 202 F.3d at 134, because "credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions." *Hunt*, 526 U.S. at 552; *Anderson*, 477 U.S. at 255.

II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE SECOND CIRCUIT PROPERLY DETERMINED THAT THERE WERE TRIABLE ISSUES OF MATERIAL FACT THAT AGE DISCRIMINATION WAS A MOTIVATING FACTOR IN PETITIONER'S DECISION TO TERMINATE RESPONDENT'S EMPLOYMENT

A. The Second Circuit Adhered To The Proper Evidentiary Framework For Evaluating Whether Carlton's Age Discrimination Claim Should Be Submitted To A Jury

In order to "progressively . . . sharpen the inquiry into the elusive question of intentional discrimination," *Burdine*, 450 U.S. at 255, this Court has "established an allocation of the burden of production and an order for the presentation of proof in Title VII discriminatory treatment cases." *St. Mary's Honor Ctr.*, 509 U.S. at 505; *see Burdine*, 450 U.S. at 255; *McDonnell Douglas Corp. v Green*, 411 U.S. 792 (1973). Though this Court has never had occasion to decide whether that application of the Title VII rule to the ADEA context is correct, it and the lower federal courts have assumed it. *O'Connor v. Consolidated*

Coin Caterers Corp., 517 U.S. 308, 311 (1996). *See Fisher v. Vassar College*, 114 F.3d 1332, 1335 (2d Cir. 1997) (en banc), *cert. denied*, 522 U.S. 1075 (1998).

1. The *Prima Facie* Case of Discrimination

Under this burden-shifting framework, the plaintiff in an age discrimination case bears the initial burden of "proving by the preponderance of the evidence a *prima facie* case of discrimination." *Burdine*, 450 U.S. at 255; *see St. Mary's Honor Ctr.*, 509 U.S. at 506.

Mystic does not challenge in its Petition the Second Circuit's conclusion that Carlton proved a *prima facie* case of age discrimination (set out in *McDonnell Douglas*, 411 U.S. at 802) by proving (1) that he was in the protected age group; (2) qualified for the position; (3) discharged; and (4) that such discharge occurred under circumstances giving rise to an inference of age discrimination. *Carlton*, 202 F.3d at 135-36. The *prima facie* case "in effect creates a presumption that the employer unlawfully discriminated against the employee" so that "if the trier of fact is silent in the face of the presumption, the court must enter judgment because no issue of fact remains in the case." *Burdine*, 450 U.S. at 254.

2. The Alleged Non-Discriminatory Reasons for the Termination

Once established, the *prima facie* case places the burden on the employer to rebut the presumption of discrimination by " 'producing evidence' that the adverse

employment actions were taken 'for a legitimate, nondiscriminatory reason'." *St. Mary's Honor Ctr.*, 509 U.S. at 506-07 (citing *Burdine*, 450 U.S. at 254). To rebut the presumption and raise "a genuine issue of fact as to whether it discriminated," *Burdine*, 450 U.S. at 254, " '[t]he defendant must clearly set forth, through the introduction of admissible evidence,' reasons for its actions which, *if believed by the trier of fact*, would support a finding that unlawful discrimination was not the cause of the employment action." *St. Mary's Honor Ctr.*, 509 U.S. at 507 (emphasis in original) (citing *Burdine*, 450 U.S. at 254-55, and n.8).

The Second Circuit found that Mystic's explanations (1) that it had experienced a significant decline in delivery income and profits due to weather conditions; (2) that a reduction-in-force was necessary to redress the imbalances in its finances; and (3) that it was dissatisfied with Carlton's job performance were sufficient to rebut the presumption of age discrimination established by the *prima facie* case. *Carlton*, 202 F.3d at 136.

3. Mystic's Alleged Non-Discriminatory Reasons are Pretextual

Once the employer has produced evidence of a legitimate, nondiscriminatory explanation for its termination decision, "the presumption raised by the *prima facie* case is rebutted" and "simply drops from the picture." *St. Mary's Honor Ctr.*, 509 U.S. at 507, 510-511 (citing *Burdine*, 450 U.S. at 255, n.10). Retaining the "ultimate burden of persuading the trier of fact that he has been the victim of intentional discrimination," the employee then has the

opportunity to demonstrate through the "presentation of his own case and through cross-examination of the defendant's witnesses" that the proffered reason was not the true reason for the employment decision, and that age was. *St. Mary's Honor Ctr.*, 509 U.S. at 507, 510-11; *Burdine*, 450 U.S. at 256. As this Court has stated, "the ultimate question is discrimination *vel non*." *St. Mary's Honor Ctr.*, 509 U.S. at 518; *Aikens*, 460 U.S. at 714. In the instant case, Carlton demonstrated that there were genuine issues of material fact as to whether Mystic's business reasons allegedly supporting its decision to fire Carlton were actually a pretext and that the real reason that he was terminated was his age. *Carlton*, 202 F.3d at 135-36; *see St. Mary's Honor Ctr.*, 509 U.S. at 507, 510-11.

In *St. Mary's Honor Ctr.*, 509 U.S. at 511, this Court held that "[t]he factfinder's disbelief of the reasons put forward by the [employer] (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination. Thus, rejection of the [employer's] proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, no additional proof of discrimination is *required*." (emphasis in original) (internal citation omitted)

The Second Circuit correctly found that the cumulative weight of Carlton's evidence would permit a rational jury to reject Mystic's non-discriminatory reasons for his termination and conclude that the real reason for his discharge was his age. *Carlton*, 202 F.3d at 137; *see Cronin v. Aetna Life Insurance Company*, 46 F.3d 196, 203-04 (2d

Cir. 1995) (holding summary judgment is appropriate only if the employer's nondiscriminatory reason is dispositive and forecloses any issue of material fact). In proving that the employer's stated reasons were pretextual, and that age was the real reason for his termination, the evidence that the employee may present can, as it did in this case, take a variety of forms, *Patterson v. McLean Credit Union*, 491 U.S. 164, 187 (1989), because an employee must often rely on the cumulative weight of circumstantial evidence to prove discriminatory animus. *See Burdine*, 450 U.S. at 255, n.8; *Aikens*, 460 U.S. at 716.

B. The Second Circuit Properly Determined That There Were Triable Issues Of Material Fact As To Whether Carlton's Termination Was Motivated By More Than Mystic's Finances.

While Mystic asserted that Carlton was terminated as part of a necessary downsizing, Carlton produced evidence that, upon his termination, his duties were transferred in part to Gounalis, a co-worker 18 years younger than him, and that his remaining duties were given to Oravets, an employee 25 years younger, who was hired to fill his position only three months after his discharge. *Carlton*, 202 F.3d at 135, 136. The Second Circuit concluded that such facts could refute Mystic's necessary reduction-in-force explanation, illustrate it as mendacious, and show that the real reason for the termination was age. *Id.*; *see St. Mary's Honor Ctr.*, 509 U.S. at 511.

It is well settled that an employee's replacement by a significantly younger person can be a reliable indicator of age discrimination. *See O'Connor*, 517 U.S. at 313. It is also

incongruous that an employer who terminates an employee because of necessary downsizing would hire someone else to fill the same position three months after the discharge. *See Oxman v. WLS-TV*, 846 F.2d 448, 453 (7th Cir. 1988). Where, as in this case, the replacements are 18 and 25 years younger, the difference between the replacements' salaries and that of the terminated employee is minimal ($10,400), and the firm's business remains slow, the trier of fact can determine "both that the reason [proffered by the employer] was false and that discrimination was the real reason." *St. Mary's Honor Ctr.*, 509 U.S. at 515; *see Stratton v. Department for the Aging*, 132 F.3d 869 (2d Cir. 1997); *Burger v. New York Institute of Technology*, 94 F.3d 830, 833-35 (2d Cir. 1996); *Viola v. Philips Medical Systems of North America*, 42 F.3d 712, 716-17 (2d Cir. 1994); *Montana*, 869 F.2d at 105.

The Second Circuit concluded that, even with Mystic's assertion that the new hiring was made because it had acquired a new account, intentional age discrimination could not be ruled out as the true impetus for the termination. *Carlton*, 202 F.3d at 136. The Court pointed out that even though Mystic wanted to reinstate Carlton's vacated position, it did not even consider rehiring him. *Id.* Whereas a younger employee Mystic terminated in the downsizing was provided with a recall option in the event Mystic's financial situation improved, Carlton was not provided with a commensurate opportunity. *Id.* In fact, at the time that Oravets was hired to take on Carlton's job responsibilities, Mystic's finances had not improved and it was not particularly busy. Furthermore, at the termination meeting, Baldari referred to Carlton's age by making the demeaning suggestion that Carlton

"retire". *Id.* The Second Circuit concluded that though evidence of one stray discriminatory comment is usually not sufficient proof to show age discrimination, it may "bear a more ominous significance" when considered within the totality of the evidence. *Id.* (quoting *Danzer v. Norden Sys., Inc.*, 151 F.3d 50, 56 (2d Cir. 1998)).

In *Taylor v. Canteen Corp.*, 69 F.3d 773, 780 (7th Cir. 1995), an employee asserted age discrimination in part because he was not afforded the opportunity to be transferred or recalled to the same or a new position after a period of layoff, as were younger employees. The Seventh Circuit held that an employer implementing a reduction-in-force may not favor younger employees over older ones by finding new positions only for the younger workers. *Id.; see Cronin*, 46 F.3d at 204; *Viola*, 42 F.3d at 718; *Oxman v. WLS-TV*, 846 F.2d at 455, n.3; *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1422-23 (9th Cir. 1990). Once it undertakes action to relocate the younger employees, the employer is obligated to make the same efforts for the older employee or show why he is not similarly situated. *Id.* Because "an inference of discrimination is raised when the terminated employee can show that others not in the favored class were treated more favorably," *Rose*, 902 F.2d at 1422-23 (internal citations omitted), the Second Circuit held correctly that there were triable issues of material fact as to whether Carlton's termination was motivated by more than Mystic's finances.

C. The Second Circuit Properly Determined That There Were Triable Issues Of Material Fact As To Whether Carlton's Termination Was Motivated By More Than Carlton's Job Performance

The Second Circuit correctly concluded that there were genuine issues of material fact as to the veracity of Mystic's assertion that it was dissatisfied with Carlton's job performance. *Carlton*, 202 F.3d at 137. Mystic, in its November 3, 1995 letter to the EEOC, specifically stated that "[Carlton] was let go for economic reasons. *The issue of performance wasn't addressed* nor was age the reason for the separation." *Id.* (emphasis added). During discovery for the District Court litigation, however, Mystic stated in its interrogatory responses and depositions that "Carlton *was fired for poor job performance.*" *Id.* (emphasis added). The inconsistencies between these justifications give rise to disbelief and a "suspicion of mendacity" as to the veracity of the Mystic's non-discriminatory explanation. *St. Mary's Honor Ctr.*, 509 U.S. at 511.

In *E.E.O.C. v. Ethan Allen, Inc.*, 44 F.3d 116 (2d Cir. 1996), a case dealing with an analogous factual situation, the Second Circuit held that a reasonable jury could infer pretext from discrepancies in employer testimony regarding reasons for termination. *See DeMarco v. Holy Cross High School*, 4 F.3d 166, 171 (2d Cir. 1993); *Schmitz v. St. Regis Paper Company*, 811 F.2d 131, 132 (2d Cir. 1987) (per curiam); *see also Washington v. Garret*, 10 F.3d 1421, 1434 (9th Cir. 1993); *Castleman v. Acme Boot Co.*, 959 F.2d 1417, 1422 (7th Cir. 1992). Thus, the Second Circuit here held that the inconsistency between the justifications offered for the dismissal in the two proceedings raised a genuine issue of material fact that Mystic's decision to terminate

Carlton was motivated by more than his poor performance. *Carlton*, 202 F.3d at 137. The Second Circuit reasonably determined that the trier of fact could conclude that an employer who provides such inconsistent statements for conduct that has been challenged as discriminatory is hedging in an attempt to cover up its discriminatory motivation. *See St. Mary's Honor Ctr.*, 509 U.S. at 511, 517.

The Second Circuit also found that Mystic misrepresented its financial position to the EEOC by reporting in its response to Carlton's claim that it had a deficit of $1.5 million in the first quarter of 1995, when in reality it had an operating profit of $584,108 during the quarter, $1.4 million less than the prior year. *Carlton*, 202 F.3d at 133. Lying to a federal agency, such as the EEOC, can be a criminal offense. *See* 18 U.S.C. § 1001; *United States v. Milton*, 8 F.3d 39, 45 (D.C. Cir. 1993), *cert. denied*, 513 U.S. 919 (1994) (upholding a conviction against a defendant who filed forms with the EEOC that contained false statements). At the very least, Mystic's misrepresentation, made under the penalty of perjury and in an effort to dissuade the federal agency charged with investigating Carlton's age claim from making an adverse finding, permits the inference that the party who has behaved dishonestly has acted with consciousness that its case is weak or unfounded. *See* 2 John H. Wigmore, Evidence In Trials At Common Law § 278(2), at 133 (Chabourn rev. 1979).

The Second Circuit believed that a comparison of Mystic's treatment of Carlton and other employees whom

it disciplined for poor performance undermined the validity of Mystic's explanation that Carlton's poor performance was the reason for his termination. Mystic, which alleged in the litigation that it had been unhappy with Carlton's work for years, continued to employ him, and Carlton never received any negative written job evaluation or formal warning that his job was in jeopardy. *Carlton*, 202 F.3d at 137. While Mystic asserted that it never took written action in the case of any employee, Oravets had received a written explanation for his termination, and earlier, while experiencing job performance problems, had received a warning in the form of a salary reduction. *Id.* The Second Circuit reasoned that the fact that no commensurate action was ever taken towards Carlton indicated that poor job performance was actually an afterthought to the true motivation behind Mystic's decision to fire him. *Id.; see Greenway v. Buffalo Hilton Hotel*, 143 F.3d 47, 51 (2d Cir. 1998).

Taking the cumulative weight of the evidence, the Second Circuit concluded that there were genuine issues of material fact as to whether Mystic's motivation in terminating Carlton's employment included discriminatory animus based on age, which could only be decided by a factfinder after trial. *Carlton*, 202 F.3d at 137; *St. Mary's Honor Ctr.*, 509 U.S. at 511.

D. Mystic Never Tried To Justify Its Pretextual Explanation for Carlton's Termination

At no point has Mystic claimed that the inconsistent and pretextual explanations it proffered for terminating Carlton's employment were intended to cover up some

other, non-age related motive that led to his termination. A finding of pretext does "not necessarily mean that the true motive was the illegal one argued by the plaintiff." *Stratton*, 132 F.3d at 880; *Fisher*, 114 F.3d at 1338; *see also Woods v. Friction Materials, Inc.*, 30 F.3d 255, 260-61 n.3 (1st Cir. 1994); *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1399 (7th Cir. 1997). The pretext may instead mask some other improper, albeit not discriminatory, motivation for the termination, such as "back-scratching, log-rolling, horse trading, institutional politics, envy, nepotism, spite, [or personal hostility]." *Id.* (citing *Fisher*, 114 F.3d at 1337 (entire quote provided)). Here, however, Mystic has at all times insisted that its multiple and inconsistent explanations were nonetheless the true reasons for the termination. Accordingly, the pretextual nature of Mystic's reasons for Carlton's termination is all the more indicative that Mystic is trying to cover up age discrimination; otherwise, Mystic would have no reason to lie, or so a jury, in conjunction with the balance of Carlton's evidence, could conclude. *Id.* at 880-81; *see St. Mary's Honor Ctr.*, 509 U.S. at 511; *Fisher*, 114 F.3d at 1337-38.

CONCLUSION

The Second Circuit correctly held that there are genuine issues of material fact as to whether age discrimination played a role in Mystic's decision to fire Carlton. Carlton is thus entitled to have a jury hear and decide his claim. As such, Mystic has advanced no reasons

warranting further review in this Court, and its Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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